No. 15647

United States Court of Appeals

FOR THE NINTH CIRCUIT

JERRY KEITH ROGERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

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INDEX

Subject Index

STATUTES AND REGULATIONS CITED

MISCELLANEOUS CITATIONS

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JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Western District of Washington, Northern Division. [R. 14-17][1] The District Court had jurisdiction under Title 18, § 3231, U. S. C. The indictment charged an offense against the Universal Military Training and Service Act (50 U. S. C. App. § 462). [R. 3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the

[1] Numbers appearing herein within brackets preceded by "R." refer to pages of the printed transcript of record filed herein.

Federal Rules of Criminal Procedure because the notice of appeal was filed in the time and manner required by law. [R. 16-17]

STATUTES INVOLVED

Section 1(c) of the Act

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the Act

Section 6(j) of the Act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncom-

batant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected

to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the Act

Section 12(a) of the Act (50 U. S. C. App. § 462(a)) provides:

". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

REGULATIONS INVOLVED

Section 1622.1(d) of the Regulations

Section 1622.1(d) of the Selective Service Regulations (32 C. F. R. § 1622.1(d); E. O. 10292, 16 F. R. 9862, Sept. 28, 1951) reads as follows:

"*General Principles of Classification.*— . . . (d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, reli-

gious, or other organization. Each such registrant shall receive equal justice."

Section 1622.14 of the Regulations

Section 1622.14 of the Regulations (32 C. F. R. § 1622.14; E. O. 10420, 17 F. R. 11593, Dec. 19, 1952) reads as follows:

"Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest. (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

"(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

"Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

(Section 1622.14 (b) contained in E. O. 10292, 16 F. R. 9862, Sept. 28, 1951.)

Section 1626.25 of the Regulations

Section 1626.25 of the Regulations (32 C. F. R. § 1626.25; E. O. 10363, 17 F. R. 5456, June 18, 1952) reads as follows:

"Special provisions when appeal involves claim that registrant is a conscientious objector. (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious

training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in combatant training and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed

forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice."

Section 1626.26 of the Regulations

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (E. O. 9988, 13 F. R. 4874, Aug. 21, 1948; redesignated at 14 F. R. 5021, Aug. 13, 1949)) reads as follows:

"*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed as prohibiting a local board

from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

STATEMENT OF THE CASE

Appellant was charged by indictment which alleged that he on the 24th day of September, 1956, at Seattle, Washington, "did knowingly, wilfully and unlawfully fail, neglect and refuse to perform a duty required of him by the Selective Service Act of 1948, and the rules, regulations and directions made pursuant thereto, in that having been duly and regularly ordered by his local Selective Service Board to report and submit to induction into the Armed Forces of the United States of America, he failed, neglected and refused to be inducted.

"All in violation of Title 50, U. S. C., Appendix 462." [R. 3]

Appellant pleaded not guilty and waived the right of trial by jury. [R. 44-45]

He caused to be issued a subpoena *duces tecum* upon the Agent in Charge of the FBI and upon the United States Attorney to produce the full and complete secret FBI investigative report used by the hearing officers of the Department of Justice in conducting hearings and making reports on the conscientious objections of appellant. [R. 4] The Government moved to quash the subpoena. [R. 5] This was supported by an affidavit that appellant had been supplied a summary of the investigative reports and the production of the reports could serve "no useful evidentiary purpose whatever in the trial of this cause and that the production of same would be contrary to the best interests of the people of the United States." [R. 7]

Appellant answered the motion to quash by affidavit showing that the purpose of subpoenaing the secret FBI investigative reports was to establish that he was prejudiced before the appeal board because the Department of Justice withheld from the appeal board favorable evidence and that until the FBI report was produced and compared

with the résumé it would be impossible for the court to decide the question involved. [R. 8-9] The motion to quash was argued at great length. [R. 23-38] The court sustained the motion to quash. [R. 10]

The case proceeded to trial. The draft board file was received into evidence as Government's Exhibit 1. [R. 47-48] It is a photostatic copy of the entire draft board file, consisting of 102 pages. The facts revealed by the draft board file shall now be stated.

Jerry Keith Rogers was born November 18, 1932, at Okanogan, Washington. (100)[2] He registered with Local Board No. 5, Seattle, Washington, on November 20, 1950. (44) On October 17, 1951, the local board mailed to him a classification questionnaire. (95) The questionnaire was filled out and returned to the local board on October 29, 1951. (95)

Appellant showed in the questionnaire that he was a minister of religion, having been formally ordained as a minister of Jehovah's Witnesses on December 17, 1950, at Seattle, Washington. He showed that, since that date, he regularly served as a minister. (97) He showed that he did odd jobs as his secular work. (98-99) The questionnaire showed that he was graduated from high school. (100)

Appellant also signed the conscientious objector blank certifying that he was opposed to both combatant and noncombatant military service. (101) He claimed classification as an ordained minister of religion and asked to be put in Class IV-D. (101)

The local board on November 7, 1951, mailed to him the conscientious objector form. He signed Series I (B) certifying "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces." (85) In the form he was asked: "Do you believe in a Supreme Being?" He answered: "Yes." The form then asked

[2] Numbers appearing in *parentheses* herein refer to the pages of the draft board file (Government's Exhibit 1). Such page numbers, written in longhand, appear at the bottom of each page of the file.

him to "describe the nature of your belief which is the basis of your claim." He answered:

"Inasmuch as Jehovah has chosen his witnesses out of the world to be ambassadors to the peoples of earth in behalf of his kingdom, they are not a part of the world. Since their allegiance is to Almighty God and his kingdom they do not participate in local, national or international elections or politics. From such they are exempt by the law of Almighty God, who commands them to remain unspotted from the world. (James 1:27) Like Christ Jesus and his apostles, who set the example to follow, they are in the world but are not a part of it. (John 17:16, 17; 15:17-19) Another reason why they abstain from the world is that the Devil is the invisible ruler thereof, and they know that to be a friend of the world is to incur the enmity of Almighty God. (James 4:4; II Corinthians 4:4)

"As to a Supreme Being, it is written at Romans 13:1-3:

" 'Let every soul be in subjection to the higher powers: for there is no power but of God; and the powers that be are ordained of God. Therefore he that resisteth the power withstandeth the ordinance of God. And they that withstand shall receive to themselves judgment. For rulers are not a terror to the good work, but to the evil. And wouldest thou have no fear of the power? Do that which is good, and thou shalt have praise from the same.' " (90-91)

He answered the question how, when and from what source he received his religious training and belief, which was the basis of his conscientious objections, as follows: "In 1949 I began to study the publications of the Watchtower Bible and Tract Society. By studying these regularly and by attending meetings and lectures on the Bible I have come to a knowledge of the Bible and the purposes of Jehovah God." (86)

He answered that he believed in the use of force in response to question II 5, as follows: "The only force I believe in is immediate self protection of myself and my friends, and that force which is commanded by God." (86)

He described the actions and behavior in his life that, in his opinion, most conspicuously demonstrate the consistency and depth of his religious convictions, as follows: "Throughout a week I study 3 and sometimes 4 books on the Bible. I go out in a prescribed territory to preach the word. Twice a week I attend meetings to further my knowledge in the Scriptures." (86)

In the form under Series III he listed the names and addresses of the schools that he had attended, the names of his employers and his places of residence. (86-87)

Series IV he answered as follows:

"1. Have you ever been a member of any military organization or establishment? . . . No.

"2. Are you a member of a religious sect or organization? Yes. . . . (a) State the name of the sect, and the name and location of its governing body or head if known to you. Jehovah's Witnesses Watchtower Bible and Tract Society 117 Adams St. Brooklyn (1) New York or 124 Columbia Hts. Brooklyn (2) N.Y. (b) When, where, and how did you become a member of said sect or organization? In 1949 in Seattle I started studying Bible aids printed by the Watch Tower Bible & Tract Society. (c) State the name and location of the church, congregation, or meeting where you customarily attend. Kingdom Hall of Jehovah's Witnesses 3856 23rd S.W. Seattle, Wash. (d) Give the name, title and present address of the pastor or leader of such church, congregation, or meeting. Ernest R. Lintow Company Servant 9675 48th S.W. Seattle, Wash. Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war. We have no official statements or creeds as to going to war except the Bible in this regard. (87) . . . Each minister of Almighty God as a follower of Christ Jesus claims his exemption from military training and service. He is in the army of Christ Jesus, serving as a soldier of Jehovah's appointed commander, Christ Jesus. (II Timothy 2:3, 4) Inasmuch as the war weapons of the soldier of Christ Jesus are not car-

nal, he is not authorized by his commander to engage in carnal warfare of this world. (2 Corinthians 10:3, 4) Furthermore, being enlisted in the army of Christ Jesus, he cannot desert the forces of Jehovah to assume the obligations of a soldier in any army of this world without being guilty of desertion and suffering the punishment meted out to deserters by Almighty God. (92) 3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations. I was a member of the Boy Scouts for a short period of time during the year 1947 with no prescribed activities out of the ordinary." (87)

Appellant in Series V gave as his references the following persons: Mrs. Leona Hagenback and Mr. J. F. Hagenback, Seattle, Washington, and Mr. L. Morgan Portteman and Mrs. Neoma Portteman, Ridgefield, Washington. (88)

Appellant was commanded by the local board to come for a preclassification hearing on December 11, 1951. He appeared. The local board made a memorandum of his personal appearance, as follows:

"Question: Is it fair to make some one else take your turn and for you to be deferred.

"Answer: Bible states that Christ had nothing to do with affairs of the world. Anyone who preaches the gospel of the kingdom is a minister. We do not believe in burdening others with our upkeep so we work at something to make a living.

"Question: Where do you work?

"Answer: Bethlehem Steel. Now unemployed.

"Question: Don't you have a desire to protect a country which gives you the freedom to have your religion? Are you indicating that you will take no part in combatant or noncombatant service.

"Answer: Would not do anything to protect rights. It is more important to do God's will than man's will.

"Question: If country was invaded would you protect yourself. . . .

"Answer: I would not kill.

"Question: Does your religion prohibit saluting the flag.

"Answer: I did salute the flag until I learned better. I would not salute it now." (84)

The local board on December 11, 1951, classified him I-A, of which he was mailed notice. (102) Rogers appealed on December 17th by letter. (82-83) On July 9, 1952, the appeal board classified him I-A. (102) On September 9, 1952, the file was called in to the office of the State Director from the local board so that it could be referred to the Department of Justice for an advisory opinion as required by Section 6(j) of the Act. The file was referred to the Department of Justice. (76-77)

The Department of Justice on August 19, 1954, wrote the appeal board a letter of recommendation. It reads, among other things, as follows:

"As required by section 6(j) of the Universal Military Training and Service Act, an inquiry was made in the above-mentioned case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Honorable John W. Keane, Hearing Officer for the Western District of Washington.

"The registrant is twenty-one years of age, unmarried and resides with his mother in Seattle, Washington. His father is living but separated from the family. The registrant is a high school graduate and he has been employed on a full-time basis at Sears-Roebuck Company as a stock clerk. Together with his mother, the registrant is a member of the Jehovah's Witnesses and he claims exemption from both combatant and noncombatant training and service on grounds of conscientious objection.

"Attached hereto and made a part hereof are a resumé of the investigative report made in this matter and Exhibits marked A through H submitted to the Department of Justice in behalf of the registrant.

"The registrant personally appeared at the hearing un-

accompanied and he informed the Hearing Officer that he did not have any early religious training but that he had been baptized in the Jehovah's Witnesses organization in December, 1950, and that he had attended meetings regularly since that time. The registrant stated that his mother has been a Jehovah's Witness since 1947 and that since December, 1950, he has spent three to four hours a week in religious activity. He further stated that he first concluded that he was a conscientious objector in December, 1950. He said he principally relied on the Commandment 'Thou Shalt Not Kill' as a basis for his objection to war and the teaching of the Bible to 'Love Thy Neighbor as Thyself.'

"The Hearing Officer stated it appeared that the registrant based his contention that he was a conscientious objector upon his abhorrence of killing another human being. The Hearing Officer stated that the registrant did not claim that the Jehovah's Witnesses Society taught its members to be conscientious objectors or that there was any rule in that respect. The Hearing Officer further advised that when questioned with respect to participation in noncombatant training and service the registrant did not support his opposition on any teaching that he had acquired from the Jehovah's Witnesses Society other then [sic] that he was a minister of the Gospel and if he were inducted into the armed services it would not leave him free to pursue his avocation. The registrant stated that such service would interfere with his religious activity and that under the teachings of his religion he should remain unspotted from the world.

"On the basis of the entire record including his personal observation of the registrant the Hearing Officer concluded that the registrant is conscientiously opposed to war in any form which involves the taking of human life and that the registrant's conscientious objections with respect to participation in combatant training are based upon his religious training and beliefs. On the other hand, however, the Hearing Officer concluded that the registrant has failed to estab-

lish that he is conscientiously opposed to noncombatant training and service in the armed forces as a result of religious training and belief. The Hearing Officer, therefore, recommended a I-A-O classification.

"After consideration of the entire file and record, the Department of Justice finds that the registrant's objections are sustained as to combatant training and service only. It is, therefore, recommended to your Board that the registrant be classified in Class I-A-O.

"The Selective Service Cover Sheet in the above case is returned herewith." (62-63)

Attached to the recommendation was a résumé of the investigative report, which reads, among other things, as follows:

"The registrant was born at Okanogan, Washington, November 18, 1932. He has resided in Seattle, Washington, since 1942. He registered with the Selective Service November 20, 1950, and filed Form I-150 as a conscientious objector in November, 1951. He claims as an exemption that he is a duly ordained minister. He graduated from West Seattle High School June 12, 1951. He was an above-average student. School records do not reflect any disciplinary or corrective action. He has been employed as a stock clerk at Sears-Roebuck Company, and has been actively participating in the Jehovah's Witness Society. Neighbors, references and acquaintances state that he has been an active member of the society and that he enjoys an excellent reputation of character. There is nothing in the investigative report which would indicate he is not sincere in his claim to being a conscientious objector on the basis of his religious training and belief.

"Prepared June 17, 1954" (64)

Several affidavits were filed showing the sincerity of the appellant, his consistent activity in the organization as a minister and the fact that he is the sole support of his mother who needs his support. These affidavits were signed by Al Evans, D. David McDowell, Mrs. W. O. Bradbury,

E. F. Larkin, M.D., Ernest Max Endlich, Mrs. Ernest M. Endlich, Jack A. Brandt, Charles E. Otto and R. Ernest Lintow. (66-73)

On September 14, 1954, the appeal board classified appellant I-A-O. (102)

On October 6, 1954, the local board requested appellant to appear before it six days later. (55) He appeared before the local board on October 12, 1954. At the hearing appellant was required to sign a two-page questionnaire. The larger part of the memorandum related to his ministerial claim. (52-54) That part of the questionnaire relating to his conscientious objector claim reads as follows:

"Under what circumstances do you believe in the use of force? In armed force to defend my family. It would have to be a theocratic war before we would participate.

"Do you believe in the use of force, in the event of attack, to defend yourself? Yes

"Your family? Yes Your home? Yes Your religious meetings? Yes

"The brethren of your religious organization? Yes Your country? No

"Did your conscientious objection to participation in war in any form develop from the suggestion or argument of other persons? I found out for myself from the teachings of the Bible.

"Is your conscientious objection based primarily upon your desire to preach? Yes

"If you were classified as a conscientious objector, would you perform civilian work in the national interest for a period of 24 consecutive months? No If not, why not? The Bible says we shall not become friends of the World. Friendship with the World is enmity with God." (54)

The local board on April 19, 1955, classified appellant I-A-O. (102) On May 24, 1955, the file was reviewed by the government appeal agent and forwarded to the State Director for transmittal to the appeal board, after the govern-

ment appeal agent had taken an appeal for appellant. (49, 102)

On August 1, 1955, the file was forwarded to the State Director for transmittal to the appeal board. (31, 102) Following the FBI investigation appellant was informed to appear before Hearing Officer Lundin in Seattle, Washington. [R. 49-50] He appeared with his mother at the office of the hearing officer. [R. 50] The hearing officer informed appellant that "he was a Bible student, and that he would like to have me state my reasons for not joining the Armed Forces, and I proceeded to show him through various citations in the Scriptures. [¶] At the end of this, I was informed by Mr. Lundin that he could not see that the testimony I had given had too much bearing on the subject, as to why I should not go and, to which I asked him if he could show me a Scripture that stated I should; and at this point he seemed rather agitated and refused to answer on the grounds of his objections; and that was just about it, so far as the testimony went." [R. 50-51]

Appellant's mother was with him at the hearing. Concerning it she testified:

"We entered his office and he asked us to be seated, and he asked my son if he could tell in his own words why he wouldn't enter the Armed Services; and my son said that he had various reasons why he wouldn't, and he quoted several Scriptures, stating that we fight not with carnal weapons, and that we are a soldier of Christ Jesus, and after he had quoted several Scriptures to substantiate his claim, Mr. Lundin said he didn't think that that would bear witness to his testimony, or wouldn't be sufficient, I should say, for his grounds of not going into the Armed Services.

"It was then that my son asked him if he could—the reason, he was a Bible student—could he give him one Scripture that would say he should go into the Armed Services, and he became quite irate, and said he didn't have to answer to him for anything; and he went on speaking about

the Scriptures, trying to further substantiate our claim . . ." [R. 53-54]

"Q. (By Mr. MacDonald): Do you recall that there was any statement concerning—at that time concerning other people going into the Military Service?

"A. He said he couldn't see why, if other boys went in, he wouldn't.

"Q. When you say 'he,' who do you mean? [46]

"A. Mr. Lundin. 'Because if other boys can go in, I don't see why you shouldn't fight for your country.'" [R. 54-55]

Following the hearing the Assistant Attorney General in Washington, D. C., wrote a letter to the chairman of the appeal board making a recommendation on the claim as follows:

"As required by section 6(j) of the Universal Military Training and Service Act, as amended, an inquiry was made by the Department of Justice in the above-mentioned case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Mr. Alfred H. Lundin, a Hearing Officer for the Department of Justice.

"The information obtained from the supplemental inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the Resumé of the Supplemental Inquiry attached hereto and made a part hereof.

"Registrant is 23 years old. He was graduated from West Seattle High School in June 1951 and he is presently employed as a store clerk at Sears - Roebuck Company. Registrant's mother has been a Jehovah's Witness since 1947 and registrant was baptized in the sect in 1950. He claims exemption from both combatant and noncombatant military training and service by reason of his religious training and belief.

"SSS Form No. 150 and addenda attached thereto reflect that registrant bases his conscientious-objector claim on his belief in a Supreme Being to Whom he is subservient.

He acquired his beliefs through study of the Watchtower Bible and Tract Society publications and through attendance at Bible study meetings. He believes in the use of force only in cases of self-defense.

"At the time of the first hearing, the registrant told the Hearing Officer that he bases his conscientious objection to combatant military training and service principally upon the Commandment "Thou Shalt Not Kill." Registrant, however, did not base his conscientious objection to noncombatant training and service upon any teaching that he had acquired from the Jehovah's Witnesses society. Rather, he based his claim upon the fact that he was a minister of the Gospel and if he were inducted into the armed services it would not leave him free to pursue his avocation. The registrant stated that such service would interfere with his religious activity and that under the teachings of his religion he should remain unspotted from the world. As a result of the first hearing, the Hearing Officer and the Department of Justice concluded that registrant had sustained his conscientious-objections to combatant training and service based upon his religious training and belief but had failed to sustain his conscientious objections to noncombatant military training and service.

"The registrant appeared for his second hearing accompanied by his mother. He stated that Jehovah's Witnesses desire to refrain from all types of warfare and he cited different portions of the Bible to confirm his stand. With respect to noncombatant service, the registrant stated that if one assists as a noncombatant, it is the same as killing. His mother volunteered that Jehovah's Witnesses do not vote and seemed to think that this was a factor which might effect her son's status.

"The Hearing Officer found that registrant appeared to be a bright young man. He also noted that 'the registrant and him mother did not offer anything to change the findings of the previous Hearing Officer, and that the registrant has failed to establish that he is conscientiously opposed to

noncombatant training and service in the armed forces as a result of religious training and belief.' Consequently, he recommended that registrant be granted a I-A-O classification.

"With respect to registrant's statement to the first Hearing Officer that he was conscientiously opposed to noncombatant military training and service because it would interfere with his ministerial and preaching work, we invite your attention to the case of *Tomlinson* v. *U. S.* 216 F. 2d 12, wherein the registrant's real objection to noncombatant service appeared to be that it would interfer [sic] with his carrying the 'message' and doing what he chose to call 'ministerial work.' In this case, the Court held:

> " 'An objection on religious grounds, to an assignment which would take the registrant away from his missionary activities, is not an objection which the Act recognizes.'

Although the registrant offered another explanation to support his objections to noncombatant training and service to the second Hearing Officer, he did not abandon his first basis but merely added to it. Consequently, the Department of Justice concludes that whereas the registrant has sustained his conscientious objections to combatant military training and service based on his religious training and belief, he has failed to sustain his conscientious objection to noncombatant military training and service. Accordingly, we recommend that the registrant be classified I-A-O.

"The Selective Service Cover Sheet in the above case is returned herewith." (35-37)

Accompanying the recommendation was a résumé of the FBI investigative report, which reads as follows:

"The registrant was born November 18, 1932. He is still employed as a stock clerk at Sears Roebuck Company, Seattle, Washington. A former supervisor stated that he had no reason to alter his opinion concerning the registrant from the previous investigation and felt that he is a con-

scientious employee of good character, undoubtedly sincere in his objection to military service. The registrant's present supervisor stated that the registrant is honest, dependable, and an excellent employee. He believes the registrant is acting in good faith in opposing military service. He pointed out that about one year ago, the registrant became seriously ill with a kidney ailment, but refused to seek medical care, stating that he believed in 'faith healing.'

"Neighbors, references, and religious affiliates all agreed that the registrant is of excellent character and reputation and a sincere active member of Jehovah's Witnesses. None had any unfavorable information concerning the registrant's character; many of the same persons were previously interviewed and advised presently that they had no reason to change their opinion of the registrant. All persons interviewed believed that the registrant is sincere in his religious beliefs and in his attitude toward military service. It was learned that the registrant married in July 1954. Many members of Jehovah's Witnesses advised that the registrant is actively engaged in religious work of the sect, including the Theocratic Ministry School and home Bible studies. An official of Jehovah's Witnesses, who maintains service records for the registrant, advised that the registrant devoted a total of sixty-five hours to religious field service work from September 1954 through August 1955.

"Records at the Seattle Credit Bureau reflect no credit rating for the registrant, but reflect that a marriage license was issued at Seattle on July 3, 1954, to the registrant and Barbara R. Uhrich, age eighteen. Credit records also reflected that Lawrence N. Rudolph sued the registrant's mother for divorce on January 29, 1953, in King County Superior Court, with the final decree being granted on May 8, 1953.

"There is no arrest record for the registrant or his mother at the Seattle Police Department or King County Sheriff's Office, but the traffic files of the Seattle Police Department reflect that on February 12, 1953, the registrant

was cited for running a red light. Records reflect that he forfeited $6.00 bail. He was again cited on June 22, 1953, for an unlawful muffler, but was cleared by test. Records further reflect that on December 3, 1953, the registrant was cited for speeding and forteited $20.00 bail." (38-39)

Appellant was mailed a copy of the recommendation along with a résumé. He answered this by letter dated June 11, 1956, reading as follows:

"In reply to your recent letter I wish to state that I have read it very carefully, the report from the Justice Department and at this time I would like to make the following facts clear to the Appeal Board.

"1. My claim for exemption as a Conscientous Objector is based solely on the fact that I am a regularly ordained Minister of the Gospel.

"2. Because of this I wish to notify the Board of my request to be classified as a Minister 4D. In support of this I submit the following information some of which you have on file.

"Prior to 1950 I took up the study of the scriptures. Then after coming to an accurate knowledge I decided to dedicate myself to God and take up his ministry. In December of 1950, I was officially ordained an active Minister of the Watchtower Bible and Tract Society. This organization I know is being used by God as his channel of communication to mankind here on earth. It is imperative that I continue the duties assigned to me by this Society in order to fulfill my ordination as a Minister and a dedicated Servant.

"One of God's commands is to preach his thoughts to others. This I engage in regularly. During the course of a week I undertake many activities to fulfill my obligation. I have been assigned by the Watchtower Bible and Tract Society as a Congregation Book Study Conductor. This duty entails leading a group of fellow Ministers in an instructive Bible Study. It is my responsibility to see that they become efficient Ministers.

"I would like to outline for you my weekly scedule [sic]

of activity to substantiate my recognition as a Minister. For example on Monday I devote several hours to personnal [sic] study in preparation for studies, I lead during the week. Tuesday I lead the Congregation Bible Study. Then on Wednesday and Thursday I conduct personnal [sic] Bible Studies with interested persons. Friday I attend the Congregations Theocratic Ministry School where I am enrolled as a student speaker where I participate in learning public speaking. On this same program I participate in what is called the Service Meeting wherein we learn better methods of preaching to the public. On Saturday I lead a group in Ministering to the public in the territory assigned me by the Watchtower Bible and Tract Society. Sunday morning this is repeated with the use of an extended sermon. Then Sunday evening I attend another Public Meeting which is a Bible lecture followed by an extensive study in the scriptures.

"With this resumé of my duties and activities I'm sure you can appreciate more fully my stand as a Minister of God, and my claim of exemption from all Military Duty. Your past classiffication requires me to desert my position and take up your cause. It would require me to give you my service and allegiance. It would require breaking of my covenant with God, Romans 1 : 31 & 32.

"As you undoubtly [sic] know I cannot serve two masters exceptibly [sic] nor could I serve two causes at the same time. (2 Timothy 2 : 3 & 4) This neccesitates [sic] my analizing [sic] your request very carefully. As I see it you want me to enroll in your Army as a soldier to accomplish the objectives of this wordly [sic] Government.

"I would like to call to your attention at this time two scriptures 2 Cor. 4 : 4, which shows that Satan is the god of this world and at 1 John 5 : 19, that shows that the whole world is lying in the power of the wicked one. Also the fact that Satan offered these Kingdoms of the world to Christ when in the wilderness. (Math. 4 : 8 & 9) From these it is unreasonable to think anything else than that all world

Governments were the Devil's property. How else could he have offered them to Christ.

"More thought along these lines is brought out at James 4:4 which states 'Ye adulterers and adulteresses, know ye not that the friendship of the world is enmity with God? Whosoever therefore will be a friend of the world is the enemy of God.' and also James 1:27 which says, 'Pure religion and undefiled before God and the Father is this, to visit the Fatherless and Widows in their affliction and to keep himself unspotted from the world.' From the foregoing scriptures it is determined that this world is in Satans control and that the Ministers of God should refrain from having anything to do with it. So if I live up to these scriptures I must reject you [sic] 1-A-O classification and ask you to properly classify me 4-D." (32-33)

On June 19, 1956, the appeal board classified appellant I-A-O, denying the full conscientious objector status or the I-A classification. The I-A-O classification made him liable for noncombatant military service as a conscientious objector. (102) On July 13, 1956, he was notified of this classification. (102)

On August 1, 1956, appellant was ordered to report for induction on September 24, 1956. (28, 102) Appellant reported and refused to submit to induction, as is stipulated in the record. [R. 48-49]

QUESTIONS PRESENTED AND HOW RAISED

I.

Whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation of the Department of Justice and the classification given to appellant by the appeal board were arbitrary, capricious and without basis in fact.

The question was raised by grounds 4 and 5 of the motion for judgment of acquittal. [R. 13]

II.

Whether the appellant was illegally denied his right to have the use of the FBI report upon the trial to test and determine whether the résumé of the FBI report sent to the appeal board was illegal because it omitted favorable evidence appearing in the FBI report that Rogers was a *bona fide* conscientious objector, notwithstanding the report of the hearing officer and the recommendation of the Department of Justice.

This question was raised by the motion to quash and the affidavit in opposition thereto, together with the order of the court thereon. [R. 5-10]

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal, duly made at the close of all of the evidence.

II.

The district court committed reversible error in quashing the subpoena *duces tecum* commanding the production of the original full secret FBI investigative report used by the hearing officer and the Assistant Attorney General in making the recommendation to the appeal board which was needed for the purpose of showing that the Department of Justice withheld from the appeal board favorable evidence appearing in such FBI report that was not put into the résumé forwarded to the appeal board.

ARGUMENT

ONE

The denial of the claim for classification as a conscientious objector was without basis in fact and the recommendation of the Department of Justice and the classification given to appellant by the appeal board were arbitrary, capricious and without basis in fact.

Section 6(j) of the Act (50 U. S. C. App. § 456(j)) previously quoted in full at pages 2-4, *supra*, provides that a full conscientious objector is one who is opposed to participation in both combatant and noncombatant military service by reason of religious training and belief. The pivotal fact on which the exemption hinges, according to the Act, is that the belief must be in the Supreme Being and that the belief involves "duties superior to those arising from any human relation."

Section 1622.14 of the Regulations (32 C. F. R. § 1622.14; see page 5, *supra*) provides the same as does the statute.

The documentary evidence submitted by Rogers establishes that he had sincere and deep-seated conscientious objections against his participation in combatant and noncombatant military service that were based on his "relation to a Supreme Being involving dutes superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry. (32-33, 35-39, 54, 62-64, 72-73, 84, 85-91)

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be de-

termined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant military service) arbitrary, capricious and without basis in fact?

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeals. In those cases the appellants, like appellant here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. See *Jessen* v. *United States,* 212 F. 2d 897 (10th Cir. 1954), where the Tenth Circuit (after following *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. 1953)) said: "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings of the courts of appeals with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Schuman* v. *United States,* 208 F. 2d 801 (9th Cir. 1953); *Clark* v. *United States,* 217 F. 2d 511 (9th Cir. 1954) (rehearing denied 221 F. 2d 480 (1955)); *Pine* v. *United States,* 212 F. 2d 93 (4th Cir. 1954); *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. 1953); *United States* v. *Pekarski,* 207 F. 2d 930 (2d Cir. 1953); *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. 1953); *Jewell* v. *United States,* 208 F. 2d 770 (6th Cir. 1953); *United States* v. *Hartman,* 209 F. 2d 366 (2d Cir. 1954); *Weaver* v. *United States,* 210 F. 2d 815 (8th Cir. 1954); *Jessen* v. *United States,* 212 F. 2d 897 (10th Cir. 1954); *United States* v. *Close,* 215 F. 2d 439 (7th Cir. 1954); *United States* v. *Wilson,* 215 F. 2d 443 (7th Cir. 1954).

These cases ought not to be pushed aside on the specious but factitious ground that because the courts in some of

those cases discussed the speculations urged on the courts as basis in fact the cases are different. They are not different because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case in so far as the statements in the draft board record showing conscientious objection are concerned.

The appeal board was advised by the Department of Justice in its recommendation to hold against the appellant because the hearing officer on the second hearing stated that appellant "did not offer anything to change the findings of the previous Hearing Officer." (36) This recommendation showed an illegal procedure was followed. The appeal board was told to give effect to the first recommendation. It was itself illegal and improperly misled the appeal board as to the status of the case of appellant. It told the board that the burden was on the appellant to prove grounds for setting aside the former recommendation or that he had to offer new evidence to change the old classification.

The second appeal and the second reference completely set aside the effects of the original hearing and recommendation. *Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir 1951); *Sterrett* v. *United States,* 216 F. 2d 659 (9th Cir. 1954); compare *Davidson* v. *United States,* 218 F. 2d 609 (9th Cir. 1954)(reversed and remanded on other grounds, 349 U. S. 918 (1955)). It was the duty of the Department of Justice and the appeal board to reconsider the case according to the status of appellant at the time of the second appeal and not according to the facts existing at the time of the first appeal. *United States* ex rel. *Hull* v. *Stalter,* 151 F. 2d 633 at pages 635, 638 (7th Cir. 1945). Since the appeal board adopted this erroneous view there is no basis in fact for the classification. See the last sentence in *Affeldt* v. *United States,* 218 F. 2d 112, 115 (9th Cir. 1954).

The Department of Justice also illegally instructed the appeal board that the opinion of this Court in *Tomlinson* v. *United States,* 216 F. 2d 12, 18 (1954), applied. (36-37) The facts in this case are entirely different from those in the *Tomlinson* case. The decision in *Tomlinson* v. *United States,* 216 F. 2d 12 (1954), is based upon "attitudes" and "demeanors" shown by the registrants upon personal appearance before the local board. There is no showing of a bad attitude or demeanor before either the local board or the hearing officer in this case. The record of hearings made by both fails to show any such bad conduct.

The sole basis for invoking the doctrine of *Tomlinson* v. *United States,* 216 F. 2d 12 (1954), is not what appellant said at the second or final hearing. It is based upon what occurred at the first hearing and which was not called to his attention at the second hearing. It is significant as to what the Department of Justice says in the second recommendation: "Although the registrant offered another explanation to support his objections to noncombatant training and service to the second hearing officer, he did not abandon his first basis but merely added to it." (37) Reliance upon statements made at the first hearing is in violation of the principle laid down in *Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir. 1951).

In the event that the Department of Justice recommendation is taken as true by this Court then it means that none of Jehovah's Witnesses is entitled to the conscientious objector classification. All of Jehovah's Witnesses take the position that, while the Bible commands strict neutrality to all worldly wars as a basis for their conscientious objection, they make the claim so they can be free to preach the Gospel of God's kingdom. See *Sicurella* v. *United States,* 348 U. S. 385 (1955). Surely this Court does not intend to permit the Department of Justice to hold that the law of this circuit is that all of Jehovah's Witnesses are not entitled to claim classification as conscientious objectors. The motive for making the conscientious objection claim is stated to be

freedom of the registrant to preach. But the legal basis of the objection under the Act is their religious training and belief in strict Bible neutrality from worldly affairs and the supreme relationship to Jehovah God over any human relationship. This belief is what brings them under the statute. The motive of making the claim so as to be free to preach the gospel does not affect this legal basis of neutrality for the claim.—*Sicurella* v. *United States,* 348 U. S. 385 (1955).

It is submitted that *Tomlinson* v. *United States,* 216 F. 2d 112 (9th Cir. 1954), is distinguishable. If it cannot be found to be distinguished from the facts in this case then this Court is requested to reconsider the decision in *Tomlinson* v. *United States,* 216 F. 2d 112 (9th Cir. 1954), because it is erroneous. It is stated in *Tomlinson* v. *United States,* 216 F. 2d 12, 17 (9th Cir. 1954), that "attitudes and demeanors which develop at the time of such a person's personal appearance may well be controlling factors." Yet there was no development in the record of disbelief or that Tomlinson was lying. There was no pointing to anything that contradicted what Tomlinson said. The Court relied upon the report of the hearing officer as basis in fact for the denial of the conscientious objector claim. Yet all the hearing officer did was to find that Tomlinson and his witness established orally at the hearing exactly what was shown in the written papers. This Court proves that he merely repeated what was in his papers by stating that the summary of the hearing made by the hearing officer "reflects the registrant's general attitude as expressed in his letters."

In the face of the record that there was nothing contradictory in the papers or that impeached what Tomlinson said, this Court wove a web of basis in fact around the case by saying that there was a hearing and that since the hearing officer could observe the attitude of Tomlinson toward war and other service his recommendation against Tomlinson was final and unreviewable. The holding of the Court, which speculates and presumes against Tomlinson without a

written record, is in conflict with *United States* ex rel. *Kulick* v. *Kennedy,* 157 F. 2d 811 (2d Cir. 1946), where it was held that if a draft official at a hearing disbelieved a registrant it is necessary to make a memorandum of such disbelief. The Court was not authorized to speculate that the hearing officer judged Tomlinson adversely because of demeanor. The process of reaching basis in fact by speculation employed by the Court in *Tomlinson* v. *United States,* 216 F. 2d 12 (9th Cir. 1954), is so great a departure from federal administrative law that it is of the greatest importance that the Court's decision be reconsidered.

The religious objections of appellant to the performance of any military service under the Act, going beyond objections to military service but including opposition to such service, do not constitute a basis for a denial of the conscientious objector status. The Department of Justice held that because appellant objected to doing anything as one of the military forces and wanted to have no part of the war effort of the nation, and because he did not limit his objections to military service, he was not a conscientious objector.

This holding of the Department of Justice was an unduly restrictive interpretation of Section 6(j) of the Act. There is nothing in the Act or the legislative history of it that indicates Congress intended to limit the religious beliefs of conscientious objectors or prescribe what is orthodox for conscientious objectors. The Department of Justice read into the Act an illegal importation that conflicts with the intent of Congress. This construction of the law emasculates the conscientious objector provisions to such an extent that it is imperative that the judgment ought to be reversed in this case to correct the holding of the Department of Justice.

The Act and the Regulations do not permit the Department of Justice to recommend, or the appeal board to accept the recommendation, that is illegal.

Section 6 (j) provides for the recommendation of the Department of Justice. This is implemented by Section 1626.25 of the Regulations. These make the recommenda-

tion a vital link in the chain of administrative proceedings. It is necessary that the Department of Justice proceedings be in accordance with law; otherwise the draft board proceedings are void.

The refusal by the Department of Justice to follow the definition of a conscientious objector fixed by Congress in the Act was equivalent to a complete denial of any hearing at all. A "hearing proceeding upon an erroneous theory . . . is no better than no hearing at all."—*Shepherd* v. *United States,* 217 F. 2d 942, 946 (9th Cir. 1954); see also *Sicurella* v. *United States,* 348 U. S. 385 (1955).

Congress did not intend to confer upon the draft boards or the courts arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurisdiction to weigh the testimony. In the case of a denial of the conscientious objector status, if there is no dispute in the evidence and the documentary evidence otherwise establishes that the registrant is a conscientious objector, it is the duty of the court to hold that there is no basis in fact. It is submitted that here the undisputed evidence shows that the appellant is a conscientious objector entitled to the I-O classification. The denial of the classification is without basis in fact. The classification of I-A flies in the teeth of the evidence. Such classification is a dishonest one, making it unlawful.—*Johnson* v. *United States,* 126 F. 2d 242, at page 247 (8th Cir. 1942).

There is no basis in fact for the classification in this case because there are no facts that contradict the documentary proof submitted by the appellant. The facts established in his case show that he is a conscientious objector to noncombatant service and, therefore, the classification given is beyond the jurisdiction of the boards.

The I-A-O classification (making appellant liable for noncombatant military service) was on its face arbitrary and capricious because it is a compromise classification.

A decision directly in point supporting the proposition

made in this case, that the I-A-O classification (conscientious objector willing to perform noncombatant military service) and the determination of the appeal board denying the I-O classification (full conscientious objector), are arbitrary and capricious is *United States* v. *Relyea,* No. 20543, United States District Court for the Northern District of Ohio, Eastern Division, decided May 18, 1952. In that case the district court sustained the motion for judgment of acquittal saying, among other things, as follows:

> "I think it would have been more difficult for the court to find the act of the Board was without any basis in fact if the Board had classified this man as I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objections on the religious grounds as being truthful, but they attempted, and in my opinion without any basis in fact, to assert that while he was sincere and conscientious, that sincerity and conscientiousness extended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war in all its forms."

This was an oral opinion which is unreported. A printed copy of the stenographer's transcript of the decision rendered by Judge McNamee accompanies this brief.

A similar holding was made by United States District Judge Murray in *United States* v. *Goddard,* No. 3616, District of Montana, Butte Division, June 26, 1952. The court, among other things, said:

> " . . . after due consideration, the Court finds that the evidence is insufficient to sustain a conviction for the reason that there is no basis in fact disclosed by the Selective Service file of defendant upon which Local Board No. 1 of Ravalli County, Montana, could have classified said defendant in Class I-A-O, and therefore the said Board was without jurisdiction to make such

classification of defendant and to order defendant to report for induction under such classification."

The above decision was a part of a judgment. No opinion was written. A printed copy of the judgment accompanies this brief.

This case is distinguished from the facts in *Head* v. *United States,* 199 F. 2d 337 (10th Cir. 1952), where the I-A-O classification was held to be proper. In that case the facts showed that the registrant was a member of a church that believed it was right to perform noncombatant military service and that the I-A-O classification was satisfactory. Also facts were present in the *Head* case which impeached the good faith conscientious objections of the registrant. Here the undisputed evidence showed that the religious group that Rogers belonged to were opposed to both combatant and noncombatant military service and that the I-A-O classification was not satisfactory. Rogers was not impeached in his good faith. Here the hearing officer of the Department of Justice recommended in favor of the good faith conscientious objections of appellant. It suggested that he be classified, not in I-A or I-A-O but in I-O. In the *Head* case there was no such recommendation. In the *Head* case there was no subpoena and demand for production of the FBI report and there was no withholding of evidence, as in this case.

There is absolutely no evidence whatever in the draft board file that appellant was willing to do noncombatant military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was a conscien-

tious objector who was willing to perform noncombatant military service. Never, at any time, did the appellant suggest or even imply that he was willing to do noncombatant military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

It was arbitrary for the appeal board to grant only part of appellant's claim and his testimony and reject the balance. The appeal board classified appellant as one who was willing to serve in the armed forces and perform noncombatant service. This finding flies directly in the teeth of the evidence and the sworn written statements submitted by the appellant.

The appeal board should have accepted the appellant's claim for exemption as a total conscientious objector or rejected it. The appeal board had no authority to compromise his claim. He either was telling the truth and was entitled to a IV-E classification (or I-O) or else he was telling a lie and deserved a I-A classification. If the appeal board demurred to his evidence it accepted the facts and made a determination that was without basis in fact, arbitrary and capricious.

It is respectfully submitted that the motion for judgment of acquittal should have been sustained because there is no basis in fact for the classification given by the appeal board and the denial of the total conscientious objector classification was arbitrary and capricious. The judgment of the court below should be reversed, therefore, and the trial court directed to enter a judgment of acquittal.

TWO

The appellant was illegally denied his right to have the use of the FBI report upon the trial to test and determine whether the résumé of the FBI report sent to the appeal board was illegal because it omitted favorable evidence appearing in the FBI report that Rogers was a *bona fide* conscientious objector, notwithstanding the report of the hearing officer and the recommendation of the Department of Justice.[3]

This ruling of the court below, denying appellant the right to show a violation of procedural due process by the Department of Justice in withholding evidence from the appeal board, is out of harmony with *Jencks* v. *United States,* 353 U. S. 657, 671, (1957).[4] There a statement given to the FBI by a witness against the defendant was held to be relevant to test the accuracy of his testimony. Here the summary of the FBI report was a "witness" against appellant in the appeal board. In the trial court, as a basis for acquittal, the appellant in this case contended that vital and important evidence favorable to his conscientious objector claim was omitted in the summary sent to the appeal board, thus denying procedural due process of law. This was not fair and just. Section 1 (c) of the Act (50 U. S. C. App. § 451 (c); see *supra,* page 2) provides for "a system of selection which is fair and just." Appellant to prove such denial of due process was entitled to test such summary, as a "witness" against him on his conscientious objector claim. He is allowed by due process of law in the district court to see whether such "witness" omitted important and material evidence supporting his conscientious objector claim that should have been given to the appeal board and exculpating

[3] *Blalock* v. *United States,* — F. 2d — (4th Cir. Aug. 7, 1957, No. 7435), is contrary. But see *United States* v. *Jacobson,* W.D. Wash., No. 49652, July 15, 1957, supporting appellant (slip opinion accompanies this brief).

[4] The recent Act of Congress amending the Criminal Code relating to the production of FBI reports in criminal cases is set forth in full in Appendix B, *infra,* pages 74-76.

him from the adverse recommendation made by the Department of Justice to the appeal board. It may very well be that a comparison of the FBI report with the summary made of it to the appeal board will show a vital omission. But assume it will not. In any event the appellant was entitled by procedural due process of law in the district court to attempt to prove the denial of due process by the Department of Justice in the draft board proceedings. Yet he was denied this right in the district court to call his "witness" (the FBI report), by the order quashing the subpoena *duces tecum*.

It must be conceded that, in the trial of all conscientious objector cases under the Act, there is an issue of procedural due process in Department of Justice proceedings. It is to determine whether the Department of Justice has broken the link in the procedural chain by denying procedural due process of law. This was so held in *Gonzales* v. *United States,* 348 U. S. 407 (1955); *Simmons* v. *United States,* 348 U. S. 397 (1955); and *Sicurella* v. *United States,* 348 U. S. 385 (1955). There is still another way by which the Department may deny procedural due process of law. It is by concealing or holding back from the consideration of the appeal board favorable evidence supporting appellant's conscientious objector claims. This is through making an incomplete or inaccurate summary of the FBI reports, suggested in *United States* v. *Nugent,* 346 U. S. 1 (1953).

Since this is an issue for the district court trying the conscientious objector cases to decide, the question inevitably arises: How can the trial court determine whether the Department of Justice withheld evidence by making an incomplete summary? The question answers itself: By a mere comparison of the documents with the summaries.

The precise question here presented has not been presented to this Court before. It was not decided in *White* v. *United States,* 215 F. 2d 782, 790-791 (9th Cir. 1954), nor *Campbell* v. *United States,* 221 F. 2d 454, 459-460 (4th Cir.

1955). Those two cases held that it was not error to exclude evidence or to quash a subpoena *duces tecum* commanding the production of the FBI report to determine whether a full and fair summary of the *unfavorable* or adverse evidence was or was not given to the registrant.

The two decisions were apparently based on the proposition that the résumé of the adverse evidence spoke for itself and there was no need to look at the FBI report to determine whether the registrant was harmed because he had the opportunity to answer the only adverse evidence before the Department of Justice that was used before the appeal board. Compare *United States* v. *Nugent,* 346 U. S. 1 (1953), with *Gonzales* v. *United States,* 348 U. S. 407 (1955). See also the order on rehearing in *Campbell* v. *United States,* 221 F. 2d 454 (4th Cir., No. 6906), dated April 14, 1955. The question decided in the *Campbell* and *White* cases, *supra,* was presented to the Supreme Court in *Simmons* v. *United States,* 348 U. S. 397 (1955), but not decided by it. Read what the Supreme Court said in the last paragraph of the opinion in that case, 348 U. S. at page 406.

An entirely different question arises when, as here, the federal courts are called upon to determine whether all the *favorable* evidence has been presented by the Department of Justice to the registrant and to the appeal board. On such an issue the harm or prejudice done to the registrant by the Department of Justice is not an act of commission that the registrant can answer but is an act of omission that the registrant has no way of protecting himself against. Where adverse evidence is used in the Department of Justice or before the appeal board, the rights of the registrants may be said to be adequately protected by the right to answer the unfavorable evidence made known to the registrant. Since his right in respect to the adverse evidence is protected by the right to reply to it before the appeal board, there is no need to subpoena the FBI report to determine if all the unfavorable evidence has been divulged, although appellant does not concede this since the question is still

open in the Supreme Court. (See *Simmons* v. *United States,* 348 U. S. 397 (1955), and *Gonzales* v. *United States,* 348 U. S. 407 (1955).) But in the case of withholding favorable evidence the situation is just the reverse of that involving adverse evidence used before the appeal board. This vast difference makes entirely inapplicable the arguments and reasons relied upon by the Government for not producing the FBI report at the trial where the only question involved is the use of unfavorable evidence.

In determining whether the appellant has been denied a full and fair hearing before the appeal board by the Department of Justice because of withholding favorable evidence appearing in the FBI report the issue is not what the Department told the appeal board in its recommendation. The issue is: What did the Department of Justice fail or refuse to make known to the appeal board that was favorable to the appellant? The résumé of the FBI reports in both these cases appears in the draft board records. But there is absolutely nothing in the recommendations of the Department of Justice or in the summaries themselves to show that all of the favorable evidence in the FBI report or all statements given by witnesses to the FBI were fully summarized or even summarized at all in the résumé.

The compulsory production of the FBI report at the trial can add nothing that does not already appear in the recommendation and résumé sent to the registrant by the appeal board for an answer. But where, as here, favorable evidence supporting the claim for classification as a conscientious objector has been, or may have been, withheld, the judicial function of the federal court to determine whether beneficial evidence has been censored and withheld by the Department of Justice is completely paralyzed —stopped dead in its tracks—until the federal court has (1) compelled the production of the FBI report, (2) examined it and (3) compared it with the résumé sent to the registrant and the appeal board and (4) then decided by such examination whether there has been a withholding of evi-

dence favorable to the registrant in violation of procedural due process of law.

It may be argued by the Government that this Court must rely upon the presumption of regularity in administrative proceedings. Notwithstanding *Koch* v. *United States,* 150 F. 2d 762, 763 (4th Cir. 1945), and *United States* v. *Fratrick,* 140 F. 2d 5, 7 (7th Cir. 1944), to the contrary, appellant says that the presumption of innocence in criminal proceedings makes inapplicable such presumption of regularity.

In *Jones on Evidence in Civil Cases,* Fourth Edition, Bancroft-Whitney Co., San Francisco, 1938, Volume 1, § 101, it is said: "Generally speaking, no legal presumption is so highly favored as that of innocence; ordinarily substantially all other presumptions yield to it in case of conflict." There the author cites *Dunlop* v. *United States,* 165 U. S. 486 (1897), and *Edwards* v. *United States,* 7 F. 2d 357. It is later stated in this section, fourth paragraph, that the presumption of innocence prevails over a large number of other presumptions. It is submitted, therefore, that it cannot be said that the Department of Justice is presumed to have made a full and complete summary of all the favorable evidence.

It may be argued that this Court cannot assume that there was other favorable evidence in the file. This argument ignores reality. There is no procedure in the Department of Justice that regulates the recommendations of the Department of Justice to the appeal board to command a summary of all the unfavorable evidence. There is nothing in fact to require the Department to refer to any favorable evidence. It can merely recommend that the conscientious objector claim be sustained or denied. It should be remembered that the recommendation of the Department of Justice is based upon the FBI record, and on it the Department of Justice finds that the registrant's objections to noncombatant service are not sustained.

It is to be seen that the recommendation is based on the

record. The record here refers to the record of the Department of Justice. This record is to be distinguished from the entire file, which refers to the draft board file. Since there is no appraisal of the record and no itemization of the evidence appearing in the record of the Department of Justice, including the secret FBI report, it requires the wildest sort of speculation to say that the recommendation of the Department of Justice is not based on some undisclosed favorable evidence withheld. Neither the court nor the appellant and his counsel have any way of telling whether there was other favorable evidence in the record without seeing the FBI report, which is part of that record. Since the recommendation is based on the record and the record includes the secret FBI report, and the final appeal board classification is based on the recommendation, the undisclosed favorable evidence may contain an explanation of adverse evidence relied upon for the denial of the conscientious objector classification.

It may be argued that the issue of subpoenaing the FBI report would be irrelevant in determining whether appellant's classification by the appeal board has a basis in fact. The issue to be determined, to which the subpoena of the FBI report is relevant, is not whether there was basis in fact. The issue is whether there was a fair résumé of the favorable evidence given to the registrant.

In each of the final recommendations of the Department of Justice it is stated that all the evidence gathered on the inquiry by the FBI is summarized in the résumé. But how can we know that it is summarized unless the FBI report is compared with the résumé? The Department of Justice may have summarized only what it considered to be material and necessary to mention to the appeal board from all of the favorable evidence gathered. It was for the registrant and for the appeal board to say what was or was not favorable.

The Court cannot and must not accept the statement of the Department of Justice in the recommendation that the résumé is accurate. The trial court erroneously concluded

and so held that the résumés were entirely adequate, complete and sufficient. This holding was made by the trial court without making any reference whatever to the original FBI report. This is blind assumption on the part of the trial court. It is not the exercise of the judicial process in determining whether the summary was full and complete by comparing the résumé with the FBI report as the trial court was required to do. The holding of the trial court based on the statement of the Department of Justice in the recommendation is in effect star chamber proceedings that are odious to the Constitution and due process of law.

It should be remembered that the Department of Justice makes its recommendation upon the entire FBI report. It is not necessary for the Department to summarize in its recommendation all the favorable evidence. There may be and often is a great deal of favorable evidence that would lead the appeal board to a favorable conclusion that may never be mentioned. To argue that notice of the evidence is confined only to what appears in the recommendation is to ignore reality and greatly to curtail and limit appellant's right. He cannot be given a summary of only what is referred to by the Department of Justice. How can the appellant answer what unfavorable parts are relied on by the Department of Justice if he does not have access to all of the favorable evidence?

It may be said that appellant has at no time set forth reasons for belief that the FBI report contained additional information favorable to his claim which was not disclosed to him. The subpoena for the FBI report was not issued in the vague hope that it contains favorable evidence but so the trial court could discharge its judicial function to decide that question. This could only be determined by the trial court's seeing the FBI report.

Appellant challenges any limitation of the right to be provided with favorable information. The Government limits the right to only such favorable evidence that will thereafter be relied upon in the Department's recommenda-

tion. At the time of the hearing, how can appellant know what the appeal board will thereafter rely upon? It is the duty of the Department to provide appellant with a fair summary of all the favorable evidence in the FBI report. This right does not hinge on what has been recommended to the appeal board by the Department. A rule that would confine the providing of information only to that which appears in the recommendation to the appeal board puts the cart before the horse and places the entire matter solely in the unreachable discretion of the Department of Justice. Congress did not intend thus, because, as has been shown heretofore, Congress said that it was after the facts. How can the facts be obtained if the Department of Justice shall say what part of the facts it shall divulge?

What Congress was after in reference of the case to the Department of Justice were not opinions and speculations, but facts. See what Senator Gurney said in making known his objections to the creation of a separate conscientious objector agency, when hearings were had on Senate Bill 2655: "What we are after really are the facts and the Department of Justice has always shown itself perfectly capable of uncovering the facts."—94 Cong. Rec. 7305.

Actually, what Congress was after by reference of the case to the Department of Justice were facts and circumstances that were consistent with the religious beliefs of the organization to which the conscientious objector belonged. The Government here has never attempted to turn up any fact showing that appellant has done that which is inconsistent with his religious beliefs. The facts turned up are facts inconsistent with what the Government says is a true conscientious objector. This attempt of the Government to constitute itself a hierarchy of conscientious objectors under the law is contrary to the intent of Congress. It permits the Government to discriminate, contrary to equal justice under law.

White v. *United States,* 215 F. 2d 782 (9th Cir. 1954), which held that the FBI report cannot be subpoenaed to

judicially determine whether all the unfavorable evidence was given to appellant in a criminal case of this kind, also laid down the proposition that the congressional intent was that the entire procedure prescribed by Section 6 (j) of the Act was for the purpose of turning up all the evidence possible to sustain the claim of the registrant. The reason being that the Department of Justice procedure is invoked only on the appeal from a denial of the conscientious objector classification.—See 215 F. 2d at pages 789-790; compare *Sterrett* v. *United States,* 216 F. 2d 659 (9th Cir. 1954).

Since Congress intended that all the favorable evidence turned up by the FBI in the investigation be made available to the registrant and to the appeal board, it follows that a question of procedural due process inheres in every case where the conscientious objector claim is recommended against by the Department of Justice on whether there was a failure to make a summary of all of the favorable evidence for the registrant and the appeal board. *White* v. *United States,* 215 F. 2d 782 (9th Cir. 1954), therefore, supports the reasons advanced here why this Court should sustain the subpoena *duces tecum.*

It may be argued that had the production of the FBI report been compelled at the trial it would mean an inquiry into the mental processes underlying the Department's recommendation. This is a most farfetched statement. It must be admitted that *United States* v. *Nugent,* 346 U. S. 1, 6, required that appellant be supplied with a fair résumé of the favorable evidence. It was a question of judicial inquiry, not into the mental processes of the officers in the Department of Justice, but whether those officers had given a full and fair summary of the favorable evidence. The issue can be very well likened to that of a trial where a book review is the subject of inquiry. How can the court determine whether the book review is full and fair without reading the book? Would a subpoena requiring the compulsory production of the book mean going into the mental processes underlying the author's work? Certainly not. The judicial

function could not be completed unless and until the book was produced. So it is here. The court cannot say whether a fair summary of the favorable evidence was given until the FBI report is produced for comparison.

This certainly should answer the argument that it is anomalous to hold that a registrant is not entitled to see the report at the hearing but can see it at the criminal trial. It would not only be anomalous but ridiculous to hold that if a registrant was entitled to have a full and fair summary at the hearing he could not have the summarized document at the trial to determine whether or not it had been fairly summarized.

The Government may argue that the Department's recommendation has been superseded by the appeal board's decision. This is hardly correct. In fact it is flagrant error. Recall that the order to report is based on the appeal board decision and the appeal board decision is based on the Department's adverse recommendation. The appeal board decision is identical to the recommendation. The recommendation is similar to a general charge. The decision of the appeal board is like a general verdict. How can it be said that the recommendation (general charge) is not a part of the chain of proceedings? (*Sicurella* v. *United States,* 348 U. S. 385 (1955)) This case held that where the appeal board decision is based on an illegal recommendation of the Department of Justice the draft board order is illegal.

The decision of the Supreme Court in *United States* v. *Nugent,* 346 U. S. 1 (1953), dealt only with the contention that the complete FBI report should be produced to the registrant at the hearing in the administrative agency.

The trial court, as a result of the *Nugent* decision, must determine another and different question. It is whether the *Nugent* opinion required the trial court to determine whether a *summary* of the favorable evidence was needed to be given and, if given, was it adequate? The holding in the *Nugent* case required the Court to do that in this case. The

Court cannot discharge the judicial function placed upon it by the *Nugent* case without seeing the FBI report. The report cannot be seen without admitting it into evidence.

Even though the records sought by the appellant are claimed to be confidential by Department of Justice Order No. 3229 (issued pursuant to 5 U. S. C. Section 22) they must be produced, because such documents are a part of and form the basis of the administrative determination and action supporting the indictment questioned by the registrant.

The only time the privilege of the Department of Justice pursuant to Order No. 3229 has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Court refused to compel the revealing of evidence that would endanger national security in the case of *United States* ex rel. *Knauff* v. *Shaughnessy,* 338 U. S. 537 (1950). But even in such a case two justices thought that the evidence ought to be revealed. See what Mr. Justice Frankfurter said in his dissent at page 549 and what Mr. Justice Jackson declared in his dissent at pages 551-552.

There is surely no need under the guise of national security to conceal from the courts the contents of an FBI report of a conscientious objector. It is not one that may affect national security. After all, the FBI report of the conscientious objector merely deals with a man's daily conduct, his religious practices and his habits. If a question of security or national interest should ever come up in the report of the FBI concerning a conscientious objector, the Attorney General could show it. Then there would be no difficulty in keeping such matters secret. To deprive a man of valuable evidence that may affect his liberty, on the ground of mere administrative privilege without some good ground for it, is repugnant to free institutions. This was stressed in the concurring opinion of Mr. Justice Frankfurter in the case of *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 172 (1951). That was the opinion

of Mr. Justice Frankfurter under an order of the Attorney General that required appropriate investigation and determination.

Unless the Government can show some legally recognizable ground for refusing to produce the FBI report at the trial in the district court, then the FBI report must be produced at such trial for inspection and use by the appellant. The reasons why the report of the FBI must be produced have been set forth by the registrant. In opposition to these points the Government argues that Order No. 3229 is sufficient to overcome the requirements of the Constitution, and "fair play." However, Order No. 3229 was issued pursuant to 5 U. S. C. § 22. That statute provides that the order shall not be in contravention of law. It has been shown that the due process clause of the Fifth Amendment requires production of all material documents at trial. The Constitution requires due process. The due process requires a hearing and an opportunity to be heard. Order 3229, as here applied, is, therefore, in contravention of law.

While the Supreme Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party of the right to see and use documents. That was decided in *United States* ex rel. *Touhy* v. *Ragen,* 340 U. S. 462, 469 (1951). See concurring opinion, p. 472.

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might affect the interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valuable evidence to which he is entitled by law. This was expressed in the case of *Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir. 1947), by Judge Clark in a concurring opinion at page 139.

The argument of the Government and the cases relied upon by it that the withholding of the FBI statement is proper and required by Order No. 3229 and 5 U. S. C. § 22 have been distinguished in *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir. 1944).

The competence of the document has been established by sources outside the document itself. Under the Act and Regulations the FBI report is relied on by the officials of the Selective Service System in making their final classification. This situation makes inapplicable the principle relied on by the Government. (*United States* v. *Krulewitch,* 145 F. 2d 76, 79 (2d Cir. 1944)) *United States* v. *Beekman,* 155 F. 2d 580, 584 (2d Cir. 1946), involved a prosecution for violations of the OPA regulations. The trial court quashed the subpoena on a motion by the Government. On appeal the court reversed on account of the error.

In *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W.D. La. 1949), the defendants were charged with a violation of the Sherman Act. The defendants moved for discovery under the Rules of Civil Procedure. The Attorney General was ordered to produce all FBI reports and other records relating to the activity of the defendants so that the trial court could determine whether they were privileged as claimed by the Attorney General. On refusal to produce, the trial court dismissed the Government's action. It appealed to the Supreme Court. The dismissal was affirmed by an equally divided court. —339 U. S. 940 (1950).

In *Bank Line* v. *United States,* 163 F. 2d 133, 138 (2d Cir. 1947), Judge Augustus Hand said:

> "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions. The existence of government privileges must be established by the party invoking them

> and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual. . . . "

This statement by Judge Hand is in line with what was stated by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123 (1951). He said:

> "Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can."—341 U. S., 172-173.

The determination of whether the information sought is privileged is not to be made by the Attorney General. That question is to be determined by the courts and not the Department of Justice. In *Zimmerman* v. *Poindexter,* 74 F. Supp. 933, 935 (D. Hawaii 1947), the court said: "But the clear mandate that all executive regulations be 'not inconsistent with law' circumscribes the power of the entity prescribing the regulation under consideration, and operates to make the applicability and enforceability of a specific department regulation a judicial question for ultimate decision by the court."

This point is further supported by the holding in *Griffin* v. *United States,* 183 F. 2d 990, 993 (D.C. Cir. 1950).

Attorney General Clark recognized that the question of privilege is one for the courts to decide rather than the Attorney General when he, in his Supplement Number 2, June 6, 1947, among other things, wrote:

> "If questioned the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality in the case and whether in the best public interests the information should be disclosed."

Later, however, the Attorney General instructed all United States Attorneys and all agents of the Federal Bureau of Investigation to refuse to produce the FBI statement, even when requested and ordered by the courts. See Order No. 3229 (Revised), dated January 13, 1953, revoking Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3 and 4 thereto, dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the courts for a determination of whether it should or should not be produced.

This new policy established by Attorney General McGranery is contrary to the established rule of law announced many years ago by the Supreme Court. In considering the claim of privilege against producing documents containing trade secrets it has been held that it is a judicial decision for the court to make. Mr. Justice Holmes in *E. I. duPont de Nemours Powder Co. v. Masland,* 244 U. S. 100, 103 (1917) said:

> " . . . if . . . in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others it will rest in the judge's discretion to determine whether, to whom, and under what precautions the revelation should be made."

The same rule ought to apply in the determination of the privilege urged by the Government.

Some courts that have given judicious consideration to the need for the production of the secret FBI investigative report for the purpose of determining whether or not there has been a full and fair summary made of the adverse evidence since the decision of the Supreme Court in the case of *United States* v. *Nugent,* 346 U. S. 1 (1953), have declared that it is necessary that the FBI report be produced at the trial. Motions to quash these subpoenas *duces tecum* by several judges have been denied.—See *United States* v. *Edmiston,* 118 F. Supp. 238, 240 (D. Neb. 1954); *United States* v. *Evans,* 115 F. Supp. 340, 343 (D. Conn.

1953); *United States* v. *Stull,* No. 5634, Eastern District of Virginia, Richmond Div., Nov. 6, 1953; *United States* v. *Stasevic,* 117 F. Supp. 371 (S.D. N.Y. 1953); *United States* v. *Parker,* No. 3651, District of Montana, Butte Div., Dec. 2, 1953; *United States* v. *Brussell,* No. 3650, District of Montana, Butte Div., Nov. 30, 1953; compare *White* v. *United States,* 215 F. 2d 782 (9th Cir. 1954); *United States* v. *Simmons,* 213 F. 2d 901 (7th Cir. 1954); *Campbell* v. *United States,* 221 F. 2d 454 (4th Cir. 1955), *contra.*

The appellee may talk about congressional intent and make policy arguments which completely skirt around the real question. This calls to mind Mr. Justice Jackson's remarks in *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U. S. 194, 214 (1947): "Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" After all the very extensive discussion by the Government it never gets around to answering the point: How can the court decide whether a full and fair summary of the favorable evidence in the FBI report that was given to the registrant? It could not answer the question without confessing that it was necessary to see the FBI report. Consequently it avoids facing the issue by talking about everything else.

The court in *Campbell* v. *United States,* 221 F. 2d 454 (1955), cites and quotes with approval *United States* v. *Simmons,* 213 F. 2d 901 (7th Cir. 1954), in which case Judge Lindley also held that the FBI report could not be subpoenaed in proceedings of this kind. Since there are many errors of law in that holding by Judge Lindley that do not become manifest until the decision is considered in detail, the appellant in this case desires to analyze the opinion of Judge Lindley on the point of invalidity of the subpoena of the FBI report. While the holding in *United States* v. *Simmons,* 213 F. 2d 901 (7th Cir. 1954), does not deal with the question of whether the subpoena could stand, if needed to determine whether a full and fair summary of the *favorable* evidence has been given, there are some statements in

the opinion that would indicate that the subpoena could not stand even for that purpose. The appellant will now, therefore, undertake an analysis of that part of *United States* v. *Simmons, supra.*

Let us consider the various so-called reasons given by the court in *United States* v. *Simmons,* 213 F. 2d 901 (7th Cir. 1954), for the refusal to produce the FBI report. It is appellant's submission that the reasons of the court are not cogent and find no basis in law. At 213 F. 2d, p. 908, the court cites *United States* v. *Everngam,* 102 F. Supp. 128 (D. W.Va. 1951); *Eagles* v. *Samuels,* 329 U. S. 304 (1946); *United States* v. *Balogh,* 157 F. 2d 939 (2d Cir. 1946); *Levy* v. *Cain,* 149 F. 2d 338 (2d Cir. 1945); and *DeGraw* v. *Toon,* 151 F. 2d 778 (2d Cir. 1945). It puts these aside as inapplicable. These are authority for the proposition that procedural due process of law must be complied with in draft board proceedings. They here support the proposition that if a hearing officer refuses to give a full and fair résumé there is a violation of procedural due process of law. They did not involve the FBI subpoena point. The doctrine of these cases supports the point here, that if there has been a violation of procedural due process of law claimed by the registrant the registrant ought to be entitled to prove it in court. And how can he prove it unless he gets the FBI report produced in court so the judge can see whether a full and fair résumé was made?

The court then (213 F. 2d, p. 909) cites *United States* v. *Bouziden,* 108 F. Supp. 395 (W.D. Okla. 1952); and *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn. 1953); as well as other cases by the district courts where the production of the FBI report has been sustained. The court overlooks the fact that Judge Wallace compelled the United States to produce the FBI report in the *Bouziden* case, *supra,* and in *United States* v. *Annett,* 108 F. Supp. 400, 404 (W.D. Okla. 1952). In one broad sweep the court says that all the other federal judges have reached their conclusions " . . . without analysis or evaluation." (213 F. 2d, p. 909) Those cases, it

is said, " . . . merely restate accepted principles of due process in selective service cases." Then the court says that the *Evans* case is " . . . predicated on error in at least two respects." According to the court these are (1) that the Government has the burden to prove validity of draft board proceedings and (2) that the *Nugent* case calls for a full and fair résumé.

The court states (213 F. 2d, p. 909): "If the Government must point to . . . evidence which the registrant has been denied an opportunity to know and rebut, we do not doubt that the proceeding is so lacking in basic fairness as to require that the classification be declared void." The court then assumes a fact that is not so, when it says that the Government " . . . cannot use the F.B.I file in a criminal trial." (213 F. 2d, p. 909) The answer is that the Government can use the FBI file in a criminal trial to prove that the hearing officer either did or did not give a full and fair summary of the unfavorable evidence. This is an erroneous statement in the opinion of the court that has no support in law.—*United States* v. *Andolschek,* 142 F. 2d 503, 506 (2d Cir. 1944); *United States* v. *Krulewitch,* 145 F. 2d 76, 78-79 (2d Cir. 1944).

The court says the *Nugent* opinion is not to be read " . . . as requiring anything more than that evidence on which a classification order must find its support must have been called to the registrant's attention during the classification process." (213 F. 2d, p. 909) This whole argument goes around in circles. It is an argument in a vacuum. It assumes a fact not true in every case and then by such assumption reaches a false premise. Yet all the time the court keeps admitting that if a registrant is not given an opportunity to answer evidence relied upon there has been a denial of due process. But the court goes on to say: "Applying these principles, we cannot hold that appellant was denied due process of law."—213 F. 2d, p. 909.

This whole argument defeats itself and cannot be understood. The basic error on which the court reaches its

wrong conclusion is: " . . . the record affords a basis in fact for his classification without reference to the Justice Department's report to the appeal board. In view of this fact, we cannot say that the action of the board was arbitrary." (213 F. 2d, p. 909) This is a very specious and factitious argument. It ignores the due process problem completely. It jumps away from the procedural due process problem and attempts to hide behind the conclusion reached by the trial court, that there has been basis in fact for the denial of the conscientious objector status.

The defect in the above argument can be illustrated best by an analogy. Suppose a defendant is on trial for murder. The trial judge violates his procedural rights. The undisputed evidence shows the defendant is guilty. He appeals and claims in the appellate court there was a deprivation of due process of law on the trial. It could be argued in the appellate court (if the argument of the court is right) that, because the defendant was admittedly guilty, he was not entitled to procedural due process of law on his trial. That is exactly what the Court of Appeals did in that case. It concluded that, because there was basis in fact for the denial of the conscientious objector status aside from the Department of Justice report and recommendation, the deprivation of procedural due process of law was harmless error.

If this new foreign principle of administrative law that has been grafted onto the law of this land by the court is accepted, it means an end to reliance on violation of procedural due process of law as basis for destruction of administrative judgments. The opinion is riddled with error when it attempts to evade the necessity to produce the FBI report.

The court then assumes another fact that was never proved in that case. It assumes a factual conclusion that could never have been reached by the trial court without the production of the FBI report. After assuming this conclusion the court holds that it is unnecessary to produce

the FBI report. The court says: "Furthermore, it appears that the hearing accorded appellant conformed to those standards of procedure set forth in *Nugent* to enable the Department 'to discharge its duty to forward sound advice to the appeal board.' "—213 F. 2d, p. 909.

The court in *United States* v. *Simmons, supra,* admits the contention of appellant and then says: " . . . the test has still been met." (213 F. 2d, p. 910) It says two types of adverse evidence were in the FBI files. How did the court know what was in the files without seeing them? The hearing officer in his report relied on two points: one the mistreatment of Simmons' wife, the other, his former drinking. There was nothing in the administrative record to show that such was all the unfavorable evidence. The Department of Justice relied on the entire file, including the secret FBI report. The Attorney General in his recommendation to the appeal board did not say that was all the unfavorable evidence, nor did the hearing officer so say.

The court (213 F. 2d, p. 910) says that Simmons was questioned about his carousing. It then says: "By his own admission, he and his wife were asked questions relating to his abuse of her." This is not a correct statement. It is unsupported by the record. There is nothing in the record at the trial showing that Simmons beat his wife. Simmons testified: "Mr. West said that he had my file, and also the F.B.I. report concerning my case. He also said in the report it was reported that I was hanging around pool rooms. . . . He asked my wife how she was feeling, and how was I treating her. My wife said 'Fine.' " Nowhere therein did the hearing officer call to Simmons' attention that he had unfavorable evidence of mistreatment of Simmons' wife.

Simmons testified: "I asked him what else was in the report. Mr. West started to tell me then about how long he had been in the law business with some large law firm here in Chicago, and that he knew all of the Justices in the Supreme Court." Now what sort of fair résumé was this?

The court said that the question asked by West, the hearing officer, of the wife of Simmons about how he was treating her, without identifying any mistreatment, was " . . . sufficient to inform him of all adverse evidence in the file brought to the attention of the classifying agency, the appeal board." (213 F. 2d, p. 910) This indirect way of informing a registrant of unfavorable parts without informing him of all the adverse evidence is nothing more than a "cat and mouse" treatment of the registrant that was never contemplated by even the lowest grade of due process in administrative agencies.

The whole approach the court in *Simmons* (*supra*) takes to the problem ignores completely the basic proposition that the entire secret FBI report was before the Department of Justice. The recommendation of the Assistant Attorney General may well have been influenced by contents of the secret FBI report not referred to by the hearing officer. The court has no way of knowing what other adverse evidence there was in the report that led the Assistant Attorney General to make his unfavorable recommendation. There may have been other adverse evidence relied upon that was not specified by the hearing officer. This being true, how can it be said that the hearing officer complied with the regulation and gave all the unfavorable evidence? This is an unusually speculative way of deciding a law question.

The question that the court in *Simmons* (*supra*) had before it was whether the FBI report should have been produced at the trial for the purpose of determining *whether there was a fair and complete summary given.* The Court of Appeals reached the conclusion that there was a full and fair summary because the hearing officer did not refer to any other unfavorable evidence and the testimony showed that these two items were slightly touched upon. This is reaching a conclusion without the evidence, the FBI report. The court reached a speculative conclusion that there was no unfavorable evidence in the file and thereby used that speculative conclusion as an excuse for failing to discharge

the judicial function of compelling the production of the FBI report.

The court in *United States* v. *Simmons,* 213 F. 2d 901 (7th Cir. 1954), says that in any event " . . . the contents of the F.B.I. file were irrelevant to any issue before the trial court and the court did not err in quashing the subpoena." (213 F. 2d, p. 910) This is an unreasonable way to approach a judicial problem.

When the question of quashing the subpoena was before the court there was no evidence whatever before the judge as to what the contents of the draft board file were. No testimony had been taken. In other words, it required the district judge to anticipate what the testimony would be, which is impossible. The question was the error in quashing the subpoena *duces tecum* and refusing to produce the FBI report. The materiality of the FBI report must be conclusively presumed on the motion to quash, because how does the court know what the evidence is going to be? It means that the court must first try the case and then determine whether the subpoena is to be quashed. This is a most complex and scrambled way to deal with orderly judicial process. The court retried the case *de novo* and reached a finding that there was no basis in fact and there was a full and fair summary given and then determined the quashing of the subpoena was not error.

It is beyond the capacity of counsel to comprehend this type of judicial process. It is not in accordance with orderly judicial thinking. It is difficult to understand how the trial court can determine when it quashes the subpoena *duces tecum* what the evidence is going to be on the trial in response to the subpoena. This putting of the cart before the horse is a basic fallacy. It should be destroyed here.

The court in *Simmons* (*supra*) states (213 F. 2d, p. 910): *"United States* v. *Evans,* 115 F. Supp. 340, and the line of cases following it are not persuasive authority for requiring production of the F.B.I. file at trials of this nature, because of the basic fallacies in reasoning on which,

as we have previously pointed out, those decisions rest." After reading all the court has to say on the subject (213 F. 2d, p. 910) this Court will be unable to find one word in the opinion that even tends to approach a demonstration that there are " . . . basic fallacies in reasoning on which . . . those decisions rest."

The court in *United States* v. *Simmons, supra,* builds up a condition intolerable to the Government if the FBI reports are produced by compulsory subpoena. It beats the drums of fear and anxiety for the draft board officials. It says that the drafting of manpower will be bogged down and completely stopped if the FBI reports are produced. The registrant is in court facing prison. He is not headed for the army. The drafting process is ended as far as he is concerned. Nothing could be farther from reality.

The Selective Service Regulations themselves require that all material and documents relied upon in the classification of a registrant must be included in the draft board file. (Section 1623.1) The court in *Simmons* says: "As offensive as may be the thought of the nameless, secret, hidden informer, anonymity of persons interviewed is a virtual necessity in this type of case, if the Department of Justice is to be unfettered in its appointed tasks of investigating claims of conscientious objection and of forwarding sound advice to the appeal boards." (213 F. 2d, p. 910) The plain answer to this great fear of making known the names and addresses of informants is that the court can compel the deletion of the names of informants before the FBI report is produced at the trial. This was done in *United States* v. *Stasevic,* 117 F. Supp. 371 (S.D. N.Y. 1953).—See also *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn. 1953).

The court says in *Simmons:* "A holding that these files must be disclosed in every case would effectively tie the hands of draft officialdom, a result which we should be hesitant to promote. (213 F. 2d, p. 910) This is a far-fetched, unreasonable, unsupported statement. Just how will due process of law in the courts where it is necessary to have

the FBI reports produced " . . . tie the hands of the draft officialdom . . . "? The court asks, in effect: 'Must we risk the raising of an army or must we risk judicial due process of law?' The issue is not so terrifying. No draft board official has yet ordered the Attorney General not to produce the FBI report. It is the Attorney General who refuses to produce it. There is no draft regulation or order from the Selective Service System that prevents the FBI report from being produced. It is the Attorney General who has brought about this perplexing problem for the court.

The Department of Justice by its misconduct in withholding the FBI report, aided by the district judge's quashing the subpoena calling for the FBI report, is the cause of the trouble and certainly it must be considered that to allow due process of law in a Selective Service case does not mean a breakdown of the armed forces of the United States.

The court in *United States* v. *Simmons, supra,* did not approach the problem with the same fearlessness that Judge Hand in the Second Circuit did in *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2d Cir. 1944); and *United States* v. *Krulewitch,* 145 F. 2d 76, 78-79 (2d Cir. 1944). See *United States* v. *Reynolds,* 345 U. S. 1, 12 (1953). Those cases held that if the Government wanted to keep the FBI reports secret they should not prosecute where the reports become material, as here. And that seems to be a complete answer to the position taken by the Department of Justice in this case.

The Government may cite to the Court *Williams* v. *New York,* 337 U. S. 241 (1949). That case involved the right of the judge to conceal confidential evidence about a murderer on a pre-sentence investigation. The defendant in the case was a gangster. He was given the death sentence on the undisclosed information in the pre-sentence investigation. Where the court has to deal with one who has accessories and friendly hardened criminals, it is often neces-

sary to protect the informants against reprisal. In such a situation, there is every reason for the nondisclosure. Protecting the informant protects his life, perhaps. A revelation of the name of the informant may spell death to him.

No such danger or any possibility of reprisal exists to the informants providing evidence adverse to conscientious objectors. There is no greater danger to an informant in a conscientious objector case than there would be in any other administrative law proceeding such as proceedings involving labor relations, rate making and deportation cases. What is there so dangerous about a conscientious objector that puts informants testifying about him in the same category as informants whose names appear in a pre-sentence investigation in murder cases? There is no similarity between the two. The use of *Williams* v. *New York,* 337 U. S. 241 (1949), has no place in this case. The holding should be put aside.

Another strong reason exists why the holding in *Williams* v. *New York,* 337 U. S. 241 (1949), is inappropriate. That case dealt with a subject matter clearly different from a determination. The trial had been held. The guilt of the defendant had already been fixed. The matter of judgment and sentence was something entirely in the discrimination of the judge. The sentencing of a defendant in a criminal case is an act of executing judgment. It involves an exercise of broad discretion on the part of the trial judge. He can consider matters that are inadmissible at the trial. He can hear pleas in mitigation. He can go into the entire background and life of the defendant. The hearing at a sentence and the consideration of the pre-sentence investigation are matters entirely in the discrimination of the judge. It is different from the trial procedure.

Had the withholding of the information in the pre-sentence investigation in the *Williams* case been evidence which the court considered at the trial and were such evidence considered in camera and not divulged to the defend-

ant, then an entirely different situation would have been presented. No court would let a judgment stand where secret evidence had been considered by the court in arriving at a finding of guilt.

The inquiry and hearing conducted by the Department of Justice were for the purpose of turning up evidence to the appeal board to make the determination of whether or not the benefits granted to the conscientious objector status shall or shall not be granted to the particular registrant. It involves a determination of justice, just like a finding of guilt or innocence involves a determination of justice. The situation here is analogous to the secret consideration of evidence withheld at a trial. It is not at all like the consideration of the pre-sentence investigation report.

Another strong reason, therefore, exists why the *Williams* case is out of place in this case. It is that the extent of punishment assessed is never a question for the appellate courts as long at it is within the law. When a sentence imposed is within the law, it can never be questioned. Anything relating to the punishment (within the law) is entirely immaterial and may not be considered.

The investigation of conscientious objector claims by the Department of Justice is not a part of the criminal investigation process by the department. Mr. Joseph C. Duggan, former Assistant Attorney General in charge of the division in the department conducting the investigations, said that the investigations were "by a division in the Department separate and distinct from that charged with enforcement of the penal sanctions of the Act." (*The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service,* Washington, Catholic University of American Press, 1946, page 113, footnote 111) It is plain that the investigation, therefore, is not of a criminal type. The informants, accordingly, are not criminal informants.

Bailey v. *Richardson,* 182 F. 2d 46 (D.C. Cir.) affirmed 341 U. S. 918 (1951), which may be relied on by the Govern-

ment is not in point. The case involved a government employee. She was subject to discharge by the government without consideration, reason or notice. The points of distinction between the cases and *Bailey* v. *Richardson, supra,* are: (1) there was no provision for a hearing made in the case, (2) there was no question of personal liberty involved and there was no chance of a jail sentence, and (3) the information dealt with in the *Bailey* case concerned security information. There is, accordingly, not the slightest similarity between the *Bailey* case and this case. It is distinguishable. It should be put aside as having no bearing on the question involved.

Escoe v. *Zerbst,* 295 U. S. 490 (1935), is in point. It did not involve a determination. The only point for consideration was the revocation of probation. The Supreme Court held that probation was an act of grace. It said that it could be coupled with such conditions as Congress may impose. The Government argued that the district judge who revoked probation under the statute without notice was within his rights. The Court said:

> "But the power of the lawmakers to dispense with notice or a hearing as part of the procedure of probation does not mean that a like dispensing power, in opposition to the will of Congress, has been confided to the courts. The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. If the statement of the Congress that the probationer shall be brought before the court is command and not advice, it defines and conditions power. (*French* v. *Edwards,* 13 Wall. 506, 20 L. Ed. 702) The revocation is invalid unless the command has been obeyed.
>
> " . . . We hold that the attempted revocation is invalid for defect of power, and that, the suspension still continuing, the petitioner is entitled to be discharged from his confinement."

This case is closer to the *Joint Anti-Fascist Refugee Committee* case (341 U. S. 123 (1951)) than it is to the *Norwegian Nitrogen Case* (288 U. S. 294 (1933)). In the *Joint Anti-Fascist Refugee Committee* case there was involved an executive order that provided only for an investigation and appropriate determination. There was no requirement of a hearing. The procedure was not prescribed by the statute as here. It was devised by the president under Executive Order 9835. Even in the absence of a statutory provision for hearing, the Supreme Court held that it was unlawful to withhold the secret investigative report.

It may be argued that because the conscientious objector status is a privilege and not a right it is not necessary to follow due process. While the status is a privilege granted by Congress, it does not mean that the constitutional rights of the registrant to a full and fair hearing guaranteed by the due process clause of the Fifth Amendment can be forfeited and taken away from him.

This same kind of argument was made by the Government in *Estep* v. *United States,* 327 U. S. 114 (1946). It argued that the defense could not be made by Estep. The Supreme Court rejected the argument that merely because exemption and deferment were privileges the constitutional rights of the registrant to procedural due process of law could be violated. The limited defense permitted in the *Estep* case also makes the validity of the draft board proceedings dependent upon a very strict compliance with the principles of fair play. This means that a full and fair hearing in the Department of Justice as well as in Selective Service System must be accorded.—*Estep* v. *United States,* 327 U. S. 114 (1946).

If the lack of the constitutional right to exemption did not permit a denial of a full and fair judicial hearing in the courts called upon to prosecute cases under the act, then why may the Department of Justice claim that it does not have to abide by due process in this case?

It is well known that practically every administrative agency of the federal government operates in fields that are not covered by the Constitution as far as the substantive right to operate in the field is concerned. The courts have, nevertheless, required the administrative agencies carrying out the governmental regulations in the field to abide by the standards of procedural due process in administering the regulatory power of the Government. The courts have repeatedly held that the administrative agencies are subject to the restraints of the due process clause of the Fifth Amendment. It has always been held that the due process clause reaches administrative agencies.—Vom Baur, *Federal Administrative Law,* § 297, p. 302, Chicago, Callaghan & Company, 1942.

At an early date it was held that the right to enter this country as an alien was not a right guaranteed by the Constitution. It was held to be a statutory privilege that could be determined by administrative agency, whose determination was final. The situation is identical to that involved here. In *The Japanese Immigrant Case,* 189 U. S. 86 (1903), it was argued by the Government that because there was no constitutional right but only a statutory privilege or grant involved the procedural due process requirements of the Fifth Amendment could not be resorted to by the immigrant. While the exclusion order was not disturbed and the dismissal of the habeas corpus petition was sustained, the Supreme Court took occasion to reject the argument of the Government that the due process clause did not reach the orders of Commissioner of Immigration. In that case it was said that—"this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard,

before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act."—189 U. S. 86, at pp. 100-101.

It is unnecessary for the administrative agency to accord a judicial trial as a part of due process. (*United States* v. *Ju Toy,* 198 U. S. 253, 263 (1905)) It is necessary that the procedural steps be otherwise in accordance with the requirements of the Fifth Amendment guaranteeing notice and the right to defend or answer a charge. (*Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company,* 227 U. S. 88, 91-92 (1913)) The Supreme Court has held that where a statute provides for an administrative hearing the due process clause of the Fifth Amendment requires a full and fair hearing in the sense of the traditional hearing.—*Shields* v. *Utah Idaho Central R. Co.,* 305 U. S. 177, 182 (1938).

Professor Wigmore in his great work on *Evidence,* in Volume 1, section 4 (b), page 34, says: "The Federal Supreme Court has occasionally (ante sec. 4a) pointed out what it considers to be the essentials of a fair trial of fact by administrative officials—the opportunity to call witnesses, the opportunity to hear the evidence on the other side, and so on. But these casual designations do not cover even the fundamentals of a simple system of proof." —See also *Dismuke* v. *United States,* 297 U. S. 167, at p. 171 (1936).

Even though the records sought by the subpoena are claimed to be confidential by the Attorney General's Order No. 3229 issued pursuant to 5 U. S. C. Section 22, they must be produced because such documents are a part of and form the basis of the administrative determination and action supporting the indictments questioned by the registrants.

The only time that the privilege of the Department of Justice pursuant to Attorney General's Order No. 3229 (5 U. S. C. 22) has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Supreme Court refused to compel the revealing of evidence that would endanger national security in the case of *United States* ex rel. *Knauff* v. *Shaughnessy,* 338 U. S. 537 (1950). But even in such a case two justices thought that the evidence ought to be revealed. Mr. Justice Frankfurter said in his dissent at page 549:

> " . . . Congress ought not to be made to appear to require that they incur the greater hazards of an informer's tale without any opportunity for its refutation, especially since considerations of national security, insofar as they are pertinent, can be amply protected by a hearing *in camera* . . . "

Mr. Justice Jackson in his dissent wrote:

> "Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace of free institutions inherent in the procedures of this pattern. In the name of security the police state justifies its arbitrary operations on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected. Cf. In re *Oliver,* 333 U. S. 257, 268. . . . Likewise, it will have to be much more explicit before I can agree that it authorized a finding of serious misconduct against the wife of an American

citizen without notice of charges, evidence of guilt and a chance to meet it."—338 U. S. at pages 551-552.

While the Supreme Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party of the right to see and use documents. That was decided in *United States* ex rel. *Touhy* v. *Ragen,* 340 U. S. 462, at 469 (1951):

> " . . . But under this record we are concerned only with the validity of Order No. 3229. The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling. This case is governed by *Boske* v. *Comingore,* 177 U.S. 459."

In a concurring opinion, Mr. Justice Frankfurter said at page 472: "There is not a hint in the *Boske* opinion that the Government can shut off an appropriate judicial demand for such papers."

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might effect the interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valuable evidence to which he is entitled by law. This was expressed in the case of *Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.), by Judge Clark in a concurring opinion at page 139: " . . . but I think no general statement of prejudice to its best interests can or should be applied to any branch of the government, including the armed forces . . . "

Order No. 3229, on the other hand, has a provision which would seem to allow disclosure of the FBI report to a registrant. That provision does not allow disclosure of the report "for any purpose other than for the performance of his official duties." This would allow disclosure of the FBI report to the registrant because the investigation is made for the hearing before the Department of Justice, at which the registrant is entitled to an opportunity to be heard. The reasons are: (1) it was in the performance of official duty by the hearing officer, and (2) his official duties to both the registrant and the appeal board could not be performed without disclosing all the evidence that he had before him, including the secret FBI report.

The Supreme Court has even held that an informer of law violations may be identified under certain conditions. See *Scher* v. *United States,* 305 U. S. 251 at page 254 (1938): "Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense as for example where this turns upon an officer's good faith. *Segurola* v. *U.S.,* 1 Cir., 16 F. 2d 563, 565; *Shore* v. *U. S.,* 60 App. D. C. 137, 49 F. 2d 519, 522; *McInes* v. *U. S.,* 9 Cir., 62 F. 2d 180."

The FBI report may be said to be immaterial to any issue. This is not so. The materiality is established by *United States* v. *Nugent,* 346 U. S. 1, 6 (1953); and *United States* v. *Evans,* 115 F. Supp. 340, 343 (D. Conn. 1953). There was a duty on the trial court to determine whether what was said by the hearing officer to appellant constituted a full and fair résumé of the unfavorable evidence. Even if the hearing officer mentioned nothing about adverse evidence or said there was none it still would be the duty of the trial court to see for itself whether there was a need to give a summary and to what extent the summary should be made. In *United States* v. *Packer,* 200 F. 2d 540, 542 (1952) (reversed on other grounds at 346 U. S. 1 (1953)), the Court of Appeals for the Second Circuit said: "It is true that in the case at bar the defendant was told that the F.B.I. report

was altogether favorable to him. But the correctness of such a representation was, in our opinion, a matter which the defendant was entitled to judge for himself by seeing the original F.B.I. record."

The judicial function of the trial court cannot be determined until the FBI report is produced. It could not be produced, because the subpoena had been quashed. The trial court could not determine, and the Government is not entitled to argue here, that it was not material or admissible unless and until it saw the FBI report. Since the trial court took steps to prevent itself from being able to perform the judicial function by quashing the subpoena the case should be reversed.

How can it be said that the FBI report is not material when the trial court did not even make an inspection *in camera?* What authority does the Government have to assert to this Court that the FBI report is not material, when the document has been kept out of the record? How can this Court decide the question without seeing the FBI report? Must this Court speculate in favor of the erroneous holding of the court below and the obdurate Government that hides the FBI report from this Court? Is this Court at the mercy of the Government? The mere asking of the questions reverberates the answer to all: No! Yet that is exactly the position the judicial process of the Court is placed in by the ruling of the court below and the position taken by the Government on this issue in this case.

The position taken by the appellant on this point is sustained by *Gordon* v. *United States,* 344 U. S. 414, 418-420 (1953). In that case Mr. Justice Jackson stated:

> "We think this misconceives the issue. It is unnecessary to decide whether it would have been reversible error for the trial judge to exclude these statements once they had been produced and inspected. For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly

exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or if so, was harmless. The question to be answered on an application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error."—344 U. S. 414, 420.

While the trial court did not find the FBI report material and mark it for identification the order quashing the subpoena in effect amounted to a finding of materiality by the trial court. For the purpose of determining whether the FBI report was subject to subpoena it must be conclusively presumed that it was material. By quashing the subpoena the trial court made it impossible for the FBI report to be produced for an inspection or examination *in camera* as to its materiality. This circumstance results in a conclusive presumption on the record in this case that it was material. The trial court in quashing the subpoena made it impossible for it to go as far as it was required to go under *United States* v. *Schneiderman,* 106 F. Supp. 731 (S.D. Cal. 1952).

The Government may take the position that it was necessary to call the witnesses subpoenaed and demand that the FBI report be produced. It was not necessary to do this. The witnesses were no longer under compulsion to produce the FBI report after the subpoena was quashed. The trial court had ruled the FBI report out. The trial counsel for appellant was merely complying with the order of the court quashing the subpoena. Had the counsel for the appellant demanded the FBI report or called the witnesses for this purpose, in the face of the ruling of that trial court previously made quashing the subpoena, it would have been treated perhaps as contempt or, at least, counsel would be subject to censure. Surely counsel is not required to go so far when a subpoena has been quashed. It has never been held that an assignment of error in quash-

ing a subpoena is waived unless the witness is called and the evidence attempted to be obtained. The courts have not stretched the procedural requirements that far.

Any argument made by the Government that the point is not ripe for decision here because appellant failed to call for the FBI report at the trial and make it part of the record on his appeal should be rejected. The Court can and should take judicial notice of the Order of the Attorney General that was in existence at the time of the trial of this case. It prohibited the United States Attorney from producing the report to the trial court even for inspection *in camera*. See Department of Justice Order No. 3229, revised by the Attorney General on January 13, 1953, revoking previous amendments of the order dated May 2, 1939, December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the court for a determination of whether the privilege outweighed the materiality of the document. Since the United States Attorney was under legal compulsion not to produce it to the court for purposes of completing the record, how can it be said that appellant failed to attempt to get it? Appellant cannot be required to go through an idle and vain gesture.

United States ex rel. *Touhy* v. *Ragen*, 340 U. S. 462 (1951), is not in point. There the proceeding did not involve the Government as a party or a criminal proceeding. (See note 6 of that opinion, at p. 467.) The specific provisions of the Rules of Criminal Procedure authorizing production of documents were not there involved. The decision involved the validity of Order No. 3229 on its face. (See notes 1 and 2 of the opinion for the order and Supplement No. 2, pp. 463-464.) It is the validity of the order, as construed and applied to the particular facts, with which the Court is here concerned.

The principle which distinguishes the *Touhy* case from this case is well expressed in *Kentucky-Tennessee Light*

and Power Company v. *Nashville Coal Company,* 55 F. Supp. 65 (W.D. Ky. 1944).

The criminal cases relied upon by the appellant in this case (*United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir., 1944) and *United States* v. *Beekman,* 155 F. 2d 580 (2d Cir., 1946)) are, like the case at bar, distinguished for the reasons stated by the Court in *United States* v. *Reynolds,* 345 U. S. 1, 12 (1953). Please read the last paragraph of the majority opinion in that case.

It is respectfully submitted that the district court committed reversible error when it quashed the subpoena *duces tecum* calling for the production of the secret FBI investigative report. Appellant was prevented from even offering the document into evidence at the trial. The document was relevant for the purpose of determining whether the hearing officer gave appellant a full and fair summary of the favorable evidence appearing in the secret FBI investigative report. No legal or justifiable basis exists for the trial court's ruling quashing the subpoena.

The judgment of the court below should be reversed and the cause remanded to the district court for a new trial because of this error.

CONCLUSION

The judgment of the court below should be reversed because the trial court committed reversible error—

(1) In denying the motion for judgment of acquittal because

(a) There was no basis in fact for the denial of the full conscientious objector status, thus making the final I-A-O classification arbitrary and capricious;

(b) The I-A-O classification is on its face arbitrary and capricious because nowhere does it appear that appellant was a conscientious objector to only combatant military training and service;

(c) The recommendation of the Department of Justice that appellant should be denied the conscientious objector status was illegal, arbitrary and capricious so as to deny appellant a full and fair hearing before the appeal board; and

(2) In sustaining the motion to quash the subpoena duces tecum, thus denying the trial court and the appellant of the only means of testing whether the Department of Justice supplied to appellant and to the appeal board a full and fair summary of all of the favorable evidence appearing in the FBI report.

Wherefore, the appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to the trial court to enter a judgment of acquittal and discharge the appellant, or in the alternative order a new trial.

Respectfully submitted,

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September, 1957.

APPENDIX A

INDEX OF EXHIBITS IN RECORD

	IDENTIFIED	OFFERED	RECEIVED
Plaintiff's Exhibit No. 1 (Draft board file of Jerry Keith Rogers)	47	47	47

APPENDIX B

CRIMINAL CODE AMENDMENT

Public Law 85-269
85th Congress, S. 2377
September 2, 1957

AN ACT

To amend chapter 223, title 18, United States Code, to provide for the production of statements and reports of witnesses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 223 of title 18, United States Code, is amended by adding a new section 3500 which shall read as follows:

"§ 3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of sub-

pena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an

order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The analysis of such chapter is amended by adding at the end thereof the following:

"3500. Demands for production of statements and reports of witnesses."

Approved September 2, 1957.